



Department of Justice
Canada

Ministère de la Justice
Canada

CCM#: 2016-001746
Unclassified
For Information

MEMORANDUM TO THE DEPUTY MINISTER

Deck on Trends in the Criminal Justice System (FOR INFORMATION)

SUMMARY

- A deck on trends in the criminal justice system (CJS) was requested by the Deputy Minister to inform the Minister on what key issues and pressures exist in the CJS across Canada.
- The Research and Statistics Division prepared a deck entitled "Trends in the Criminal Justice System".
- The Deck is attached at Annex A.

BACKGROUND

On December 22, 2015, the Deputy Minister met with the Director General of the Policy Integration Coordination Section and a representative from the Research and Statistics Division. At that meeting the Deputy Minister requested a deck on Trends in the Criminal Justice System (CJS) in order to inform the Minister on key issues and pressures impacting the CJS. The deck is attached at Annex A.

DISCUSSION

The attached deck provides an overview of specific trends in the criminal justice system. Of note, the deck highlights:

- the increasing costs in the CJS, despite a decreasing crime rate;
- the jurisdictional differences in the crime rate, noting that crime rates are highest in the provincial north and the Territories;
- the high proportion of certain crimes not reported to police and the reasons provided for not reporting;
- issues and trends related to vulnerable populations (i.e., those with mental health issues, substance abuse problems and neurocognitive disorders);
- that we are lacking a full picture of issues related to bail;
- that more than half of accused in custody have not been sentenced;
- that administration of justice offences, impaired driving offences and theft account for over 40% of the court caseload as well as a large proportion of resources; and,

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- that Indigenous offenders are overrepresented in both provincial/territorial and federal corrections and that this has been increasing over the past decade.

Many of the criminal justice system pressures (e.g., increased use of remand, increasing number of mandatory minimum penalties, high rates of Administration of Justice Offences, etc.) are disproportionately and negatively affecting Indigenous accused and other vulnerable groups.

RESOURCE IMPLICATIONS

N/A

COMMUNICATION IMPLICATIONS

N/A

NEXT STEPS

The deck at Annex A provides more detail on specific “Trends in the Criminal Justice System” and can be used to inform the Minister. We welcome any further changes or additional information you would like added to the material provided.

Attachment(s)

Annex A – Trends in the Criminal Justice System

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DEPARTMENT OF JUSTICE

Trends in the Criminal Justice System: Background for Presentation to the House Committee on Justice and Human Rights

Research and Statistics Division
February 23, 2016



Highlights

- Costs of the Criminal Justice System (CJS) are high and increasing, despite a decreasing crime rate
- Crime rates are highest in the provincial north and the Territories
- In 2014, most victims of sexual assault did not report the crime to police
- Chronic (repeat) offenders are responsible for a large volume of crime
- Accused with mental health, substance abuse, and neurocognitive disorders (e.g., Fetal Alcohol Spectrum Disorder) are overrepresented in the CJS
- Indigenous people are overrepresented both as victims and offenders and this has been increasing despite the *Gladue* decision
- We are lacking a full picture of the bail issue, however, for the 10th consecutive year, accused in remand outnumber those in sentenced custody
- Administration of justice offences represent the highest volume of cases in adult criminal court



Costs of the CJS are high and increasing

- In 2008, the total cost of the criminal justice system was \$15 billion.
- The total tangible (eg., health care, productivity loss) costs of *Criminal Code* offences was approximately \$31.4 billion in 2008.
- From 2002-2012, despite a decreasing crime rate there was a 36% increase in the overall CJS costs.
 - Costs increased 22% per Canadian (from \$480-\$580).
 - Federal CJS costs increased by 33% and provincial CJS costs increased by 37%.
 - Policing costs increased 43%.
 - Court system costs increased 21%.
 - Corrections costs increased 32%.

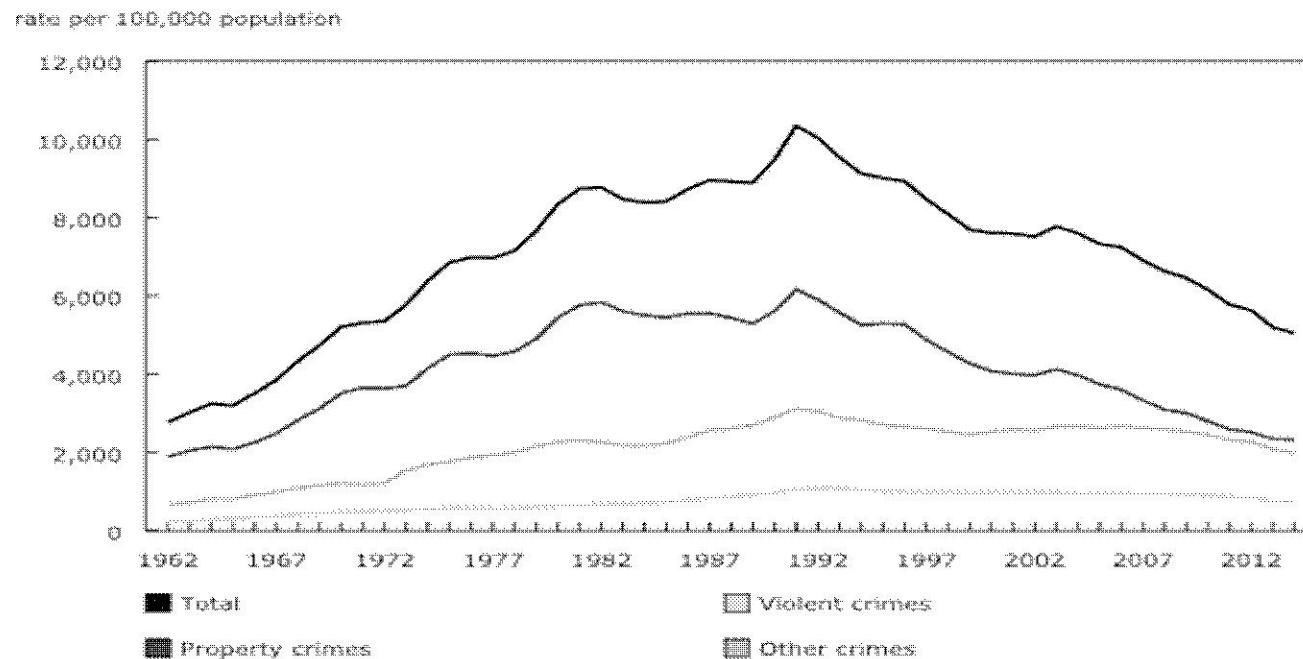
Cost Category	Costs \$ (Millions)
Criminal Justice System Costs 2008	
Police	\$8,587
Court	\$672
Prosecution	\$528
Legal aid	\$373
Corrections	\$4,836
a. Adult Corrections	\$3,869
b. Youth Corrections	\$967
Criminal Code Review Board	\$12
TOTAL CRIMINAL JUSTICE SYSTEM COSTS	\$15,009

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Tangible costs include such things as health care, productivity loss, stolen or damaged property



Even though CJS costs are increasing, police-reported crime rate is at its lowest since 1969



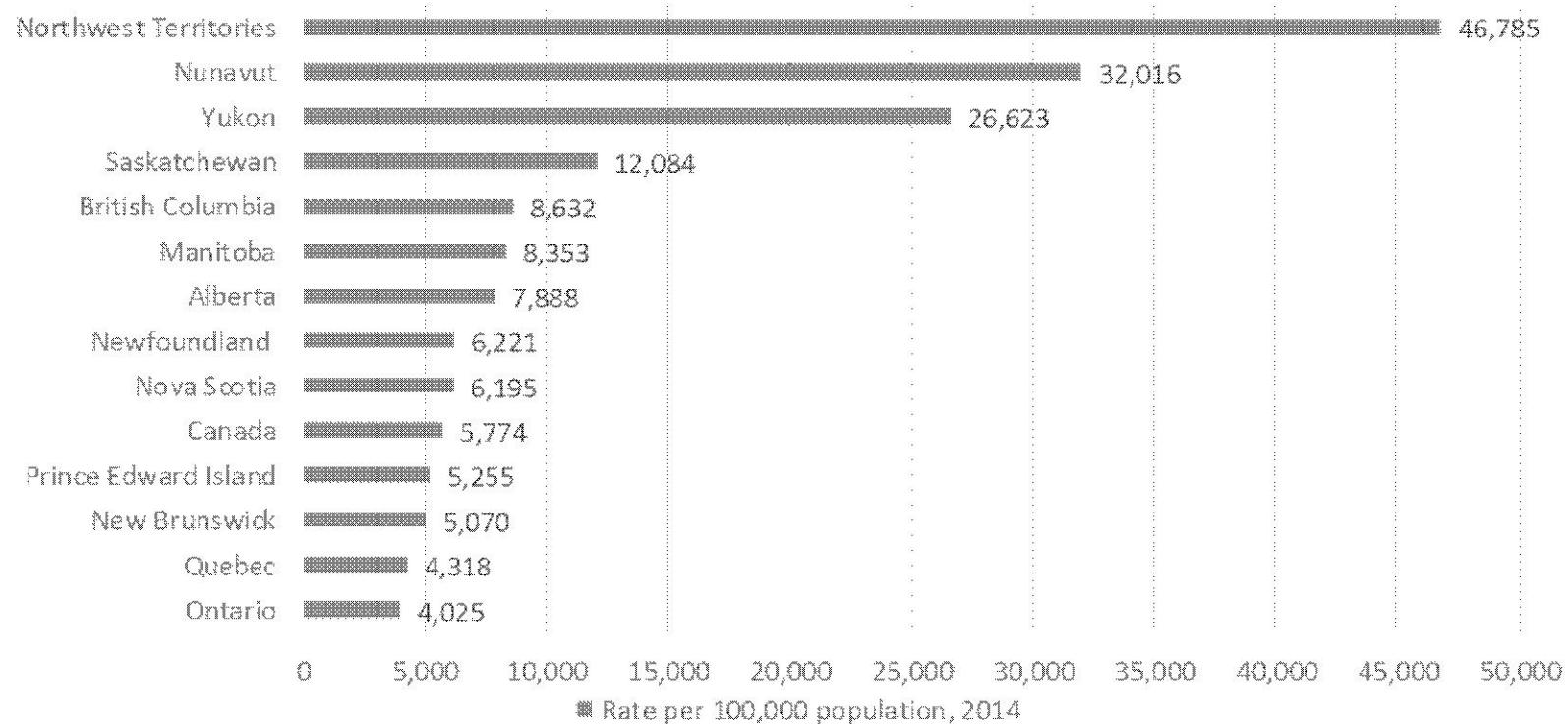
- 2014 represented the 11th consecutive decrease in the police reported crime rate.
- The rate of violent crime peaked in 2000 and has steadily decreased. The rate of violent crime has decreased by 26% from 2004.
- The Crime Severity Index (CSI) decreased for the 11 consecutive year. Both the violent (-5%) and non-violent (-2%) CSI decreased in 2014

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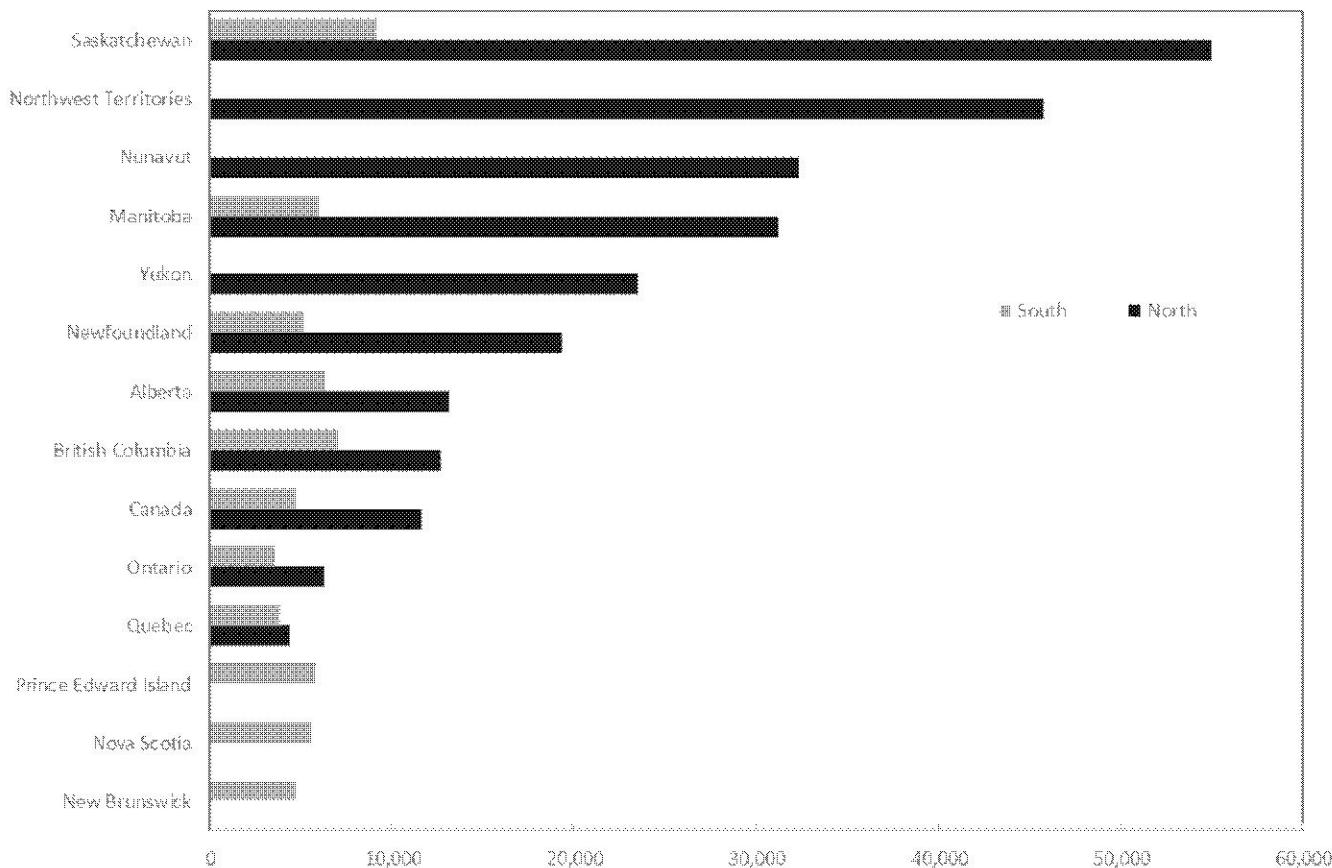
Overall crime rates are substantially higher in the Territories, 2014

Rate per 100,000 population, 2014





Compared to the south, crime rates are highest in the provincial north (particularly Saskatchewan and Manitoba) and territories, 2013





Almost two-thirds of criminal incidents not reported to police

- According to the 2014 General Social Survey, about one-third (31%) of crimes were reported to the police.
- Rates of reporting to the police were highest for incidents of household victimization (36%), followed by thefts of personal property (29%) and incidents of violent victimization (28%).
- For sexual assault, 83% of incidents were not reported to the police, while 5% of incidents were reported. In 12% of cases, respondents did not answer or did not know if the incident was reported to police.
- Reasons for not reporting the incident to police included:
 - Believing the incident was not important enough (78%);
 - Believing there was a lack of evidence (52%);
 - Believing the police would not have found the property or offender (51%);
 - Thinking no one was harmed or there was no financial loss (49%) and
 - Feeling that the incident was a personal matter (43%).



Violent victimization decreasing; risk factors of age, mental health, sex

- According to the 2014 General Social Survey for the provinces, violent victimization – which includes robbery, physical assault and sexual assault - was 28% lower in 2014, than 10 years ago.
 - Robbery decreased 39% from 2004 (men are primarily the victims);
 - Physical assault decreased 35% from 2004 (men are primarily the victims);
 - Sexual assault remained relatively stable over the past decade (women are primarily the victims).

Key risk factors for violent victimization include:

- Age - young people (aged 20-24) are most at risk;
- Mental health – second most influential factor associated with risk of violent victimization in 2014;
- Sex – females were at a higher risk of violent victimization than males in 2014;
- Drug use, binge drinking and frequent evening activities – all these lifestyle behaviours increased the risk of violent victimization in 2014;
- Maltreatment as a child, history of homelessness, homosexuals/bisexuals,
- Indigenous people, particularly women, at greater risk for victimization.

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Chronic offenders are responsible for a large volume of crime

- There are no national data for chronic or repeat offenders.
- According to BC Corrections, in 2012:
 - More than two-thirds of offenders were reoffenders;
 - 40% had 10 or more convictions over 5 years; and
 - 5% had 24 or more convictions over 5 years.
- According to Statistics Canada, in Saskatchewan (2015):
 - 65% of persons with a police contact had at least one re-contact with police
 - 21% of persons with a police contact were responsible for 57% of police volume (5 or more contacts) within 2 years
 - Prevalence of re-contact was highest among
 - youth (younger than 15 years);
 - those found guilty; and
 - those who are sentenced to custody

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There is a high prevalence of persons with substance abuse and mental disorders in the CJS

Mental Health

- Prevalence of offenders with mental health disorders is 2 to 3 times higher than in the general population and the prevalence has been increasing.
- Excluding substance abuse and anti-social personality disorder, over 40% of male and over 50% of female federal offenders have a lifetime prevalence of a mental disorder.

Substance Abuse

- The Correctional Service of Canada (CSC) reports that 80% of federal offenders have past or current substance abuse issues.
- Other studies report that two-thirds of crimes are committed while under the influence of alcohol or drugs.

Neurocognitive Disorders and Fetal Alcohol Spectrum Disorder (FASD)

- The Yukon Department of Justice will release results from a FASD prevalence study in March 2016. Previous correctional file reviews found that 22% of this population may have FASD.
- A study at a federal penitentiary in Manitoba found 10% of the sample had FASD and 70% had 2 or more neurocognitive deficits (e.g., memory, learning, etc.).
- Another study by CSC of male federal offenders found that 25% have cognitive deficits.

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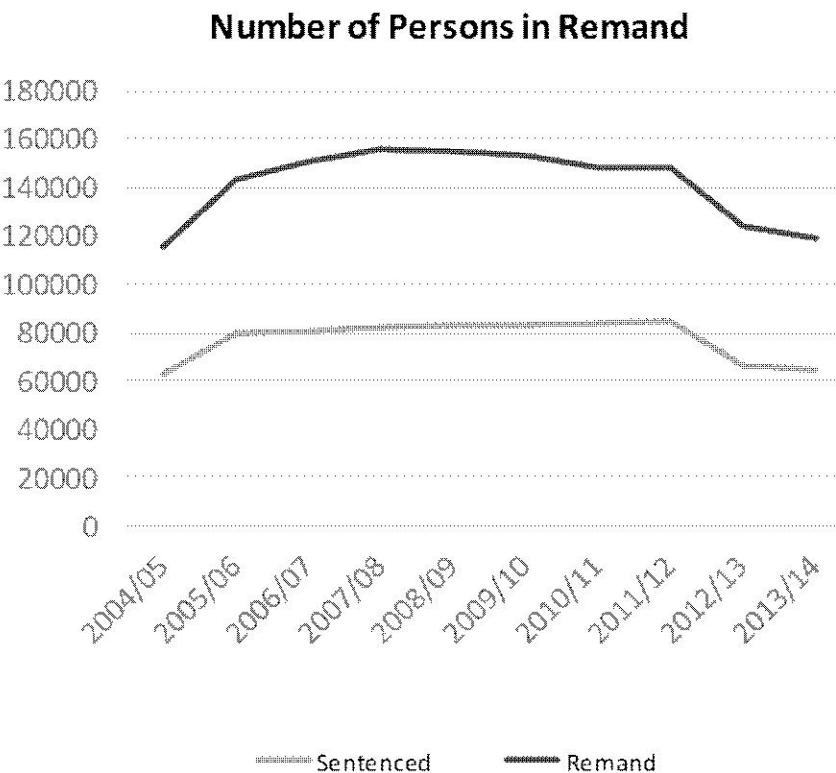
We are lacking a full picture of the bail issue

- Official statistics and research are lacking which prevents a full picture of the bail issue.
- Based on an older study from Ontario, police are more likely to detain accused for a bail hearing than previously. The proportion of criminal cases that began in bail court rose from 39% in 2001 to 50% in 2007.
- This study also found that bail cases are requiring more appearances and the time it takes to make a bail decision has increased. In Ontario, in 2001 it took an average of about four days to complete a bail process. By 2007, this had increased to almost six days.
- Data from 4,013 bail court observations in eight different Ontario courthouses (from 2006-2008) found that in 76% of the cases the appearances were adjourned.
- A Justice Canada study in 2008 found that those who were male, single, Indigenous, unemployed and charged with robbery, administration of justice or break and enter were more likely to be detained by both police and court.
 - This study also found that one-quarter (25%) of accused were identified as violating or breaching their order of release by police, while a smaller proportion of accused violated their bail order (18%).
- Criminal justice professionals have noted an aversion to risk reduces discretion at all stages of the bail decision-making process.



More than half of accused in custody have not been convicted

- Since 2004/05 the number of persons in remand has outnumbered those in provincial/territorial sentenced custody.
- Adults in remand made up 54% of the custodial population, while those in sentenced custody made up 46% in 2013/2014.
- In 2013/14, the largest proportions of remanded persons were in Nova Scotia (67%), Ontario (63%) and Manitoba (62%).
- In 2013/14, Indigenous offenders accounted for 24% of all admissions to remand, up from 19% in 2005/06.
- The number of days in remand has been increasing in some jurisdictions (notably Nova Scotia, New Brunswick, Yukon).
- In 2008/09, the longest number of days in remand was 46 (Newfoundland) and the shortest was 4 (Quebec).



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Administration of justice, impaired driving and theft account for over 40% of court caseload

- Administration of justice offences accounted for 23% of all cases in adult criminal court
- Impaired driving cases (11%) and theft (10%) accounted for the next highest volume of cases

- Median days to case completion is 123 days; however it varies by jurisdiction and offence type (2013/14)
 - Quebec (238), Manitoba (159) and Nova Scotia (155) have higher than national average median days (123)
 - Homicides had the longest median days to case completion (451 days), followed by sexual assault cases (321 days) and attempted murder cases (314 days).

- A Justice Canada research study (2008) found that cases were longer when:
 - The accused had a criminal history
 - The most serious offence was violent
 - There was no guilty plea
 - The accused breached release conditions
 - There was inconsistent legal representation



Administration of Justice Offences (AOJOs) are responsible for a large proportion of CJS resources

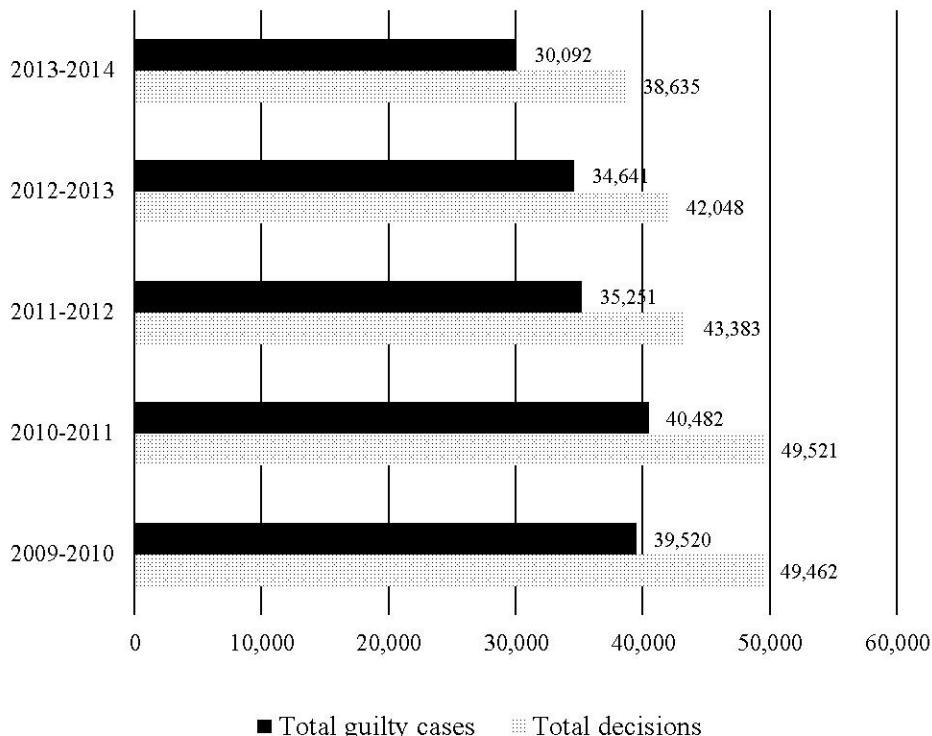
- In 2014, AOJOs represented 9% of police-reported *Criminal Code* incidents.
- The rate of AOJOs that result in a charge increased by 4% from 2006 to 2014.
- Rates of AOJOs are highest in the territories and Saskatchewan:
 - Northwest Territories: 2,448 incidents per 100,000 population
 - Yukon: 2,300 incidents per 100,000 population
 - Saskatchewan: 2,041 incidents per 100,000 population
 - Nunavut: 1,705 incidents per 100,000 population
- Since 2006, approximately 7 in 10 cases for AOJOs result in a guilty decision. This is higher than the average for all other offences.
- In 2013/14, 50% of AOJOs in adult criminal court were given custody, which is higher than crimes against property (41%) and crimes against the person (36%).
- In 2009, administration of justice offences cost the criminal justice system an estimated \$729 million.



While the number of impaired driving cases has decreased, the time to case completion has increased

- The number of impaired driving cases decreased by 22% from 2009/10 – 2013/14
- The median days to case completion was 141 days in 2013/14, up from 115 days in 2012/13.
- The national conviction rate has stayed near 80% for the past five years.
- 9% of impaired drivers received a custodial sentence; sentences are a median of approximately one month.
- Fines represent the majority (82%) of most serious sentences given for impaired driving convictions.

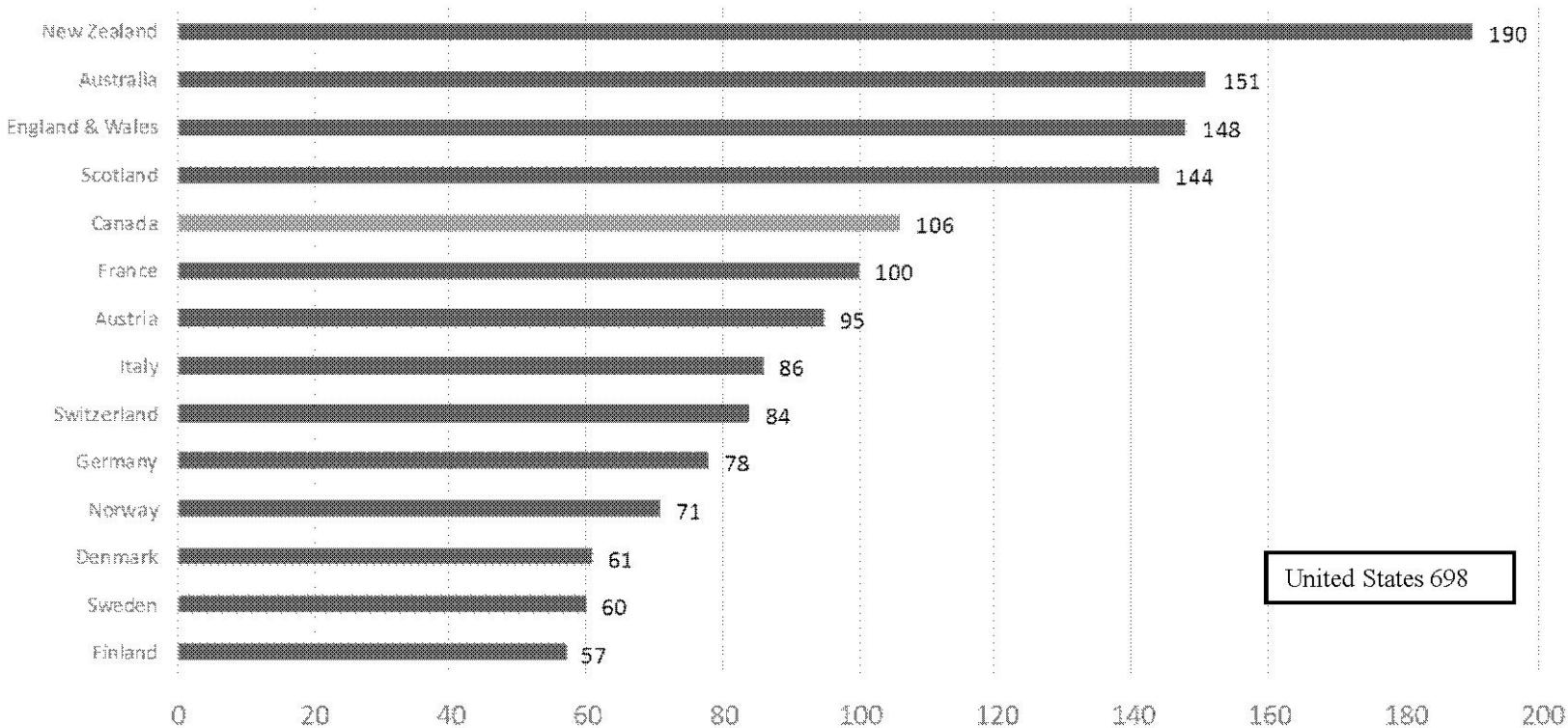
Impaired Driving Cases: Total Decisions and Guilty Cases, National, 2009/10 – 2013/14





Canada's incarceration rate is higher than most Western European Countries

Number of inmates per 100,000 population



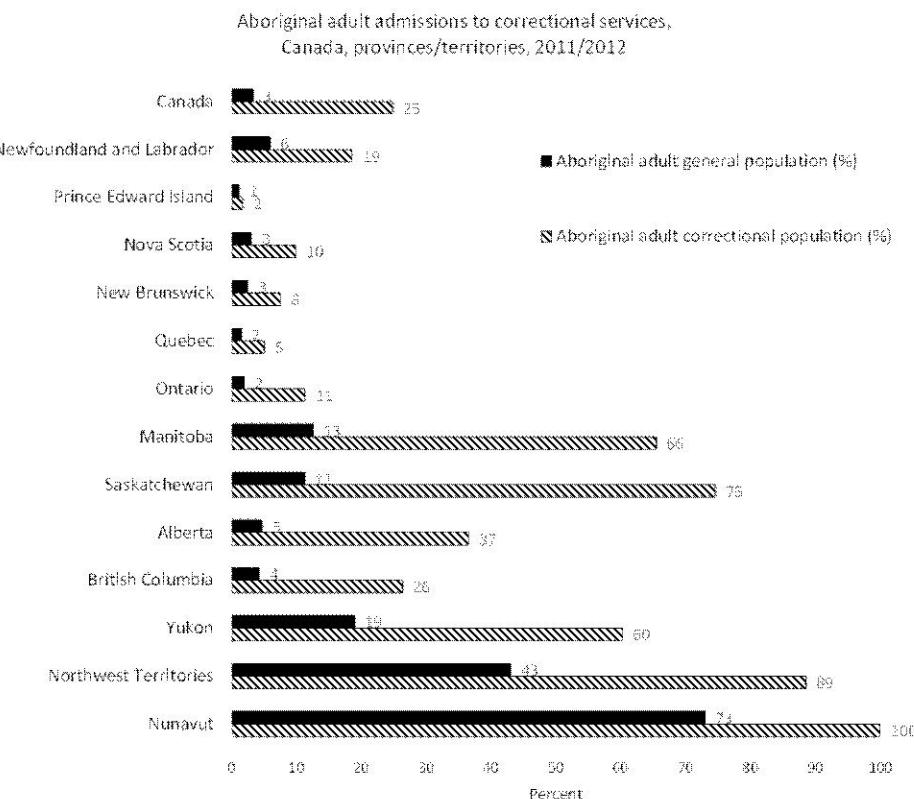
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Indigenous offenders are overrepresented in corrections in all jurisdictions in Canada

- The proportion of Indigenous male adults admitted to sentenced provincial/territorial custody in Canada is about 8 times higher than their representation in the Canadian adult population. The proportion is 12 times higher for Indigenous women in custody.

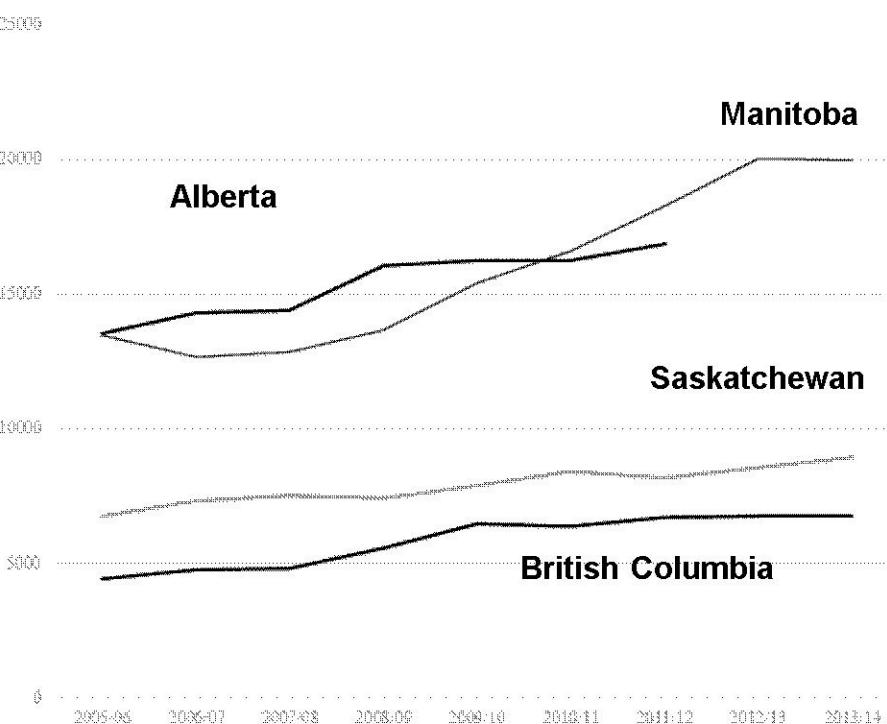




Indigenous offenders in provincial/territorial corrections have continued to increase across Canada

- About one-quarter (25%) of adult males admitted to provincial/territorial sentenced custody in Canada in 2013/2014 were Indigenous, up from 15% in 2000/2001.
- More than one-third (36%) of adult women admitted to provincial/territorial sentenced custody in Canada in 2013/2014 were Indigenous, up from 18% in 2000/2001.
- In 2013, compared to the Canadian Indigenous population, Indigenous offenders were most overrepresented in Alberta (9 times for men and 13 times for women).
- In 2013/14, there was an 11% decrease in the overall number of offenders in provincial/territorial sentenced custody, from the previous year.

Number of Indigenous Offenders in Provincial/Territorial Custody



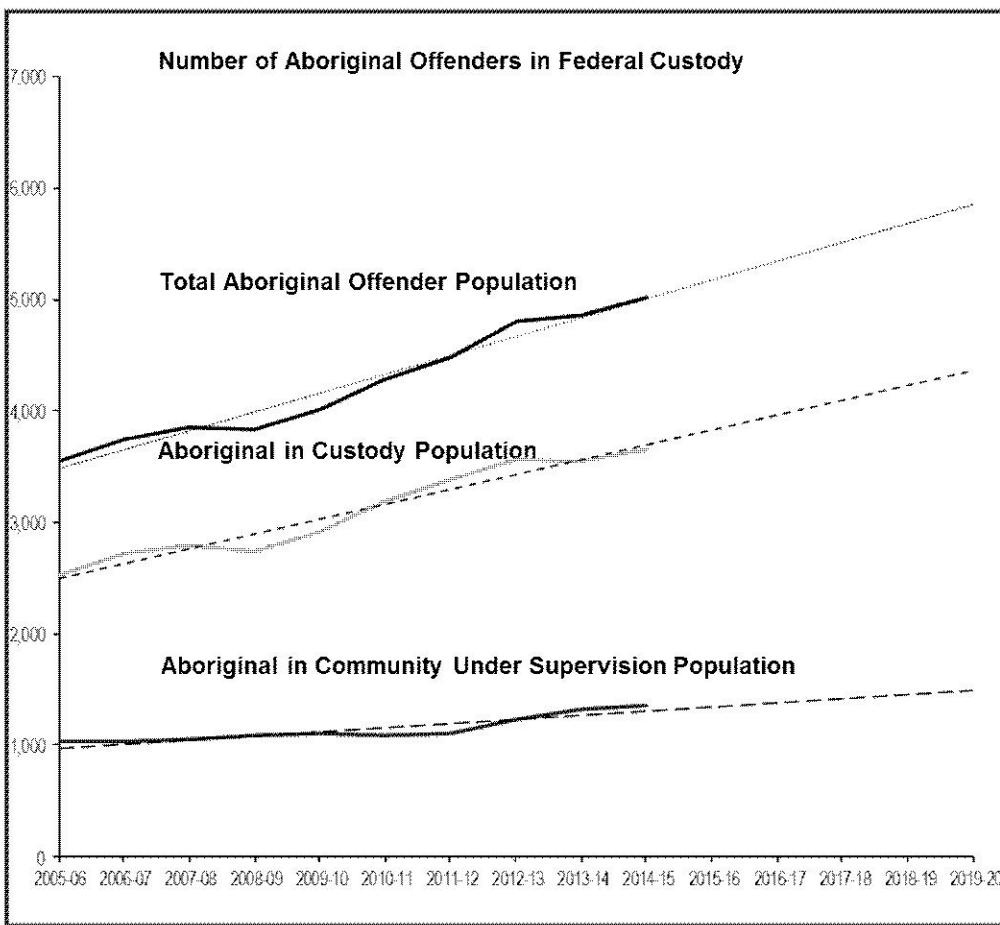
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Note: data not available for Alberta for 2012/13 and 2013/14



If no changes are made, the number of Indigenous offenders in federal custody will continue to increase

- If nothing changes, approximately 1,000 more offenders will be in federal custody in ten years.
- The Indigenous population is rising. By 2036 Indigenous people could account for between 4.6% and 6.1% of the Canadian population.
- The Indigenous population is young and since most crime is committed by young people, the Indigenous offender population may grow partially due to a young and growing Indigenous population.
- The median age at admissions of Indigenous offenders is lower (30) compared to non-Indigenous offenders (34).
- In 2014/15, 22% of the total federal offender population was Indigenous. An increase of 17% from 2010/11.
- In 2013/14 there was a 3% decrease from the previous year in the overall number of federal offenders in custody.



The dashed lines represent the projected numbers of Indigenous offenders in federal custody until 2019/20



Conclusion

- Some important areas of the criminal justice system are lacking data to help create a national picture and fully understand the nature of the problem.
- Reforms of these system pressures would likely result in a reduced number of vulnerable populations coming into repeated contact with the system, thus lessening the financial burden on the system, increasing social welfare and security of Canadians and increasing the objectives and principles of timely, fair, sustainable and equitable access to justice.

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TRUTH AND RECONCILIATION COMMISSION – DEPARTMENTAL RESPONSE

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The Government of Canada is expected to respond to the Truth and Reconciliation Commission's (TRC) Final Report Summary, including 94 recommendations focusing on repairing the relationship between Aboriginal people and the rest of Canada.

BACKGROUND

The June 2, 2015 TRC recommendations include both policy and program responses, and beyond this, broader positions on the need to improve the Government of Canada's relationship with Aboriginal people. A response from the Government of Canada is expected and at this point, has not been publicly made. While there is no deadline for the response, the TRC recommends many actions start immediately. The final report (six volumes) is expected to be released in December 2015.

Aboriginal Affairs and Northern Development Canada (AANDC) is leading the government-wide response to the recommendations and has been working closely with departments to ensure a coordinated approach.

Overview of Recommendations.

The TRC recommendations touch on both the **policy** and **legal** mandate of Justice Canada. Relating to **legal**, recommendations touch on s. 35 and equality rights (e.g., protecting, preserving or recognizing Aboriginal languages, traditional governance structures – particularly relating to justice or “sovereignty”), the conduct of litigation in relation to children’s issues, legislative changes, the issuance of a new Royal Proclamation, and the creation of new covenants or councils. Relating to **policy**, several recommendations focus specifically on addressing the over-representation of Aboriginal adult and youth offenders and victims in the criminal justice system and touch on mandatory minimum penalties, funding for community alternative measures for offenders, accessible victims services, needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), and a public inquiry into missing and murdered Aboriginal women and girls.

Implications.

The recommendations related to the over-representation of Aboriginal victims and offenders (adult and youth) in the criminal justice system have implications for Justice Canada's **policy and program** mandate.

RECOMMENDED OPTION

It is recommended that Justice Canada continue working with federal partners to support AANDC in leading the government-wide response. In preparation for the possible release of an official Government response in the coming months, Justice Canada officials have identified options that Justice Canada could undertake. Among the many options are the following:



KEY CONTACT

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Policy Sector Aboriginal Affairs Portfolio

24/03/2016

SERVING CANADIANS

DEPARTMENT OF JUSTICE

Resetting Our Relationship with Indigenous People

December 2, 2015

 Ministère de la Justice Canada  Department of Justice Canada

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SERVING CANADIANS

PURPOSE

- Minister of Justice and Attorney General of Canada's Mandate Letter includes a personal commitment from Prime Minister:

"It is time for a renewed, nation-to-nation relationship with Indigenous People based on recognition of rights, respect, co-operation, and partnership."
- This deck will present a Justice Canada approach to Indigenous justice issues, supportive of your dual roles as Attorney General of Canada and Minister of Justice, that proposes a whole-of-government approach to renew the nation-to-nation relationship with Indigenous people and improve conditions in Indigenous communities.

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BACKGROUND INFORMATION

- Pressures have triggered need to reconsider Justice Canada's role in an integrated whole-of-government approach to Indigenous issues:
 - **Attorney General role:** provides whole-of-government legal advice to the executive branch; conducts all litigation for the federal government
 - **Minister of Justice role:** legal advisor to Cabinet, develops Indigenous justice policy (among other areas); provides legal policy advice and programs to support Indigenous people's access to justice and safer communities

In support of your dual role, a departmental Indigenous Justice Plan (the Plan) was recently developed:

- The Plan recommends options for whole-of-government approach in two priority areas:
 - 1) Resetting the relationship in Aboriginal law policy advice and litigation context
 - 2) Resetting the relationship by strengthening capacity to build safer socially/economically stronger Indigenous communities
- The Plan links Justice's levers (e.g., legal advice, litigation, policy, programs) to ensure an integrated federal approach and is aligned with Government's policy direction and instructions received to date

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DEVELOPMENTS AND CHALLENGES

- Some policy drivers:
 - 94 Calls to Action in June 2015 Truth and Reconciliation Commission's (TRC) Summary Report (final report due December 15, 2015)
 - Expectations of inquiry on missing and murdered Indigenous women and girls
 - Mandate letter priorities
- Sources of current relationship issues:
 - legacy of colonization
 - policies and programs not responsive to Aboriginal rights, claims, aspirations
 - Government jurisdictional divides and lack of coordination in supporting Indigenous communities
- Resulting in:
 - Indigenous litigation inventory: over 1,000 cases (400+ are active)
 - Over-representation in criminal justice system (CJS) as victims/accused/offenders
 - 3% of the population; 20% of federal inmates; 24% of PT admissions.
 - Youth: 7% of the population; 41% of admissions.
 - 6x more likely to be victims of homicide

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KEY STAKEHOLDERS/PARTNERS

- **Indigenous communities**
 - Seek real and substantive reconciliation/ respectful partnerships to ensure initiatives are responsive to their rights, aspirations, and priorities
- **Federal partners**
 - Seek an integrated approach, e.g., among Justice Canada, Public Safety, Public Prosecution Service of Canada, Indigenous and Northern Affairs (INA) and social/economic development departments
- **Provinces and Territories**
 - [Redacted]
- **Non-governmental organizations**
 - [Redacted]
- **Private sector (e.g., natural resource-based companies)**
 - [Redacted]

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MANDE LETTER PRIORITIES

- Four Indigenous-related priorities:
 1. **Inquiry** into murdered and missing Indigenous women and girls (co-led with INA)
 2. **Review litigation strategy**
 3. **Review/assess CJS changes and sentencing reforms** to reduce rate of incarceration (co-led with Public Safety)
 4. **Address gaps in services to Indigenous people/communities** (co-led with Public Safety)
- Four principles driving proposed options to: 1) meet your priorities; 2) advance objectives of the Plan:
 1. Apply reconciliation lens
 2. Renewed relationship
 3. Build on what works to collaboratively design options to address gaps
 4. Contribute to whole-of-government approach

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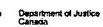
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OPTIONS – Aboriginal Law

Resetting the relationship between Indigenous people and the Government of Canada in Aboriginal law policy, advice and litigation context

Justice Canada provides legal and strategic legal policy advice to government on litigation, consultation, negotiations and policy development relating to Aboriginal and treaty rights, and other legal issues relating to Indigenous peoples. Proposed new initiatives:

These initiatives would also support your efforts and those of other Ministers, as set out in Mandate Letters, to improve conditions for Indigenous people (Annex). 7

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OPTIONS – Communities

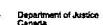
2. Resetting the relationship between Indigenous people and the Government of Canada by strengthening capacity to build safer, socially and economically stronger communities

A. Current initiatives :

- **Violence against Indigenous women and girls:** Developing *Compendium of Promising Practices* and family violence awareness materials; implementing justice components of SWC-led *Action Plan*
- **Criminal law policy:** Legal policy advice, with Indigenous lens, on: sentencing (including *Gladue*), mandatory minimums, administration of justice offences, restorative justice, mental health (including Fetal Alcohol Spectrum Disorder), *Youth Criminal Justice Act* (undertake initiatives encouraging better responses for offenders/accused)
- **Federal Victims Strategy:** Supports development/delivery of culturally responsive victim services for Indigenous victims of crime
- **Programs responses:** Two Indigenous justice programs delivered in collaboration with PTs, communities and service delivery agencies: **Aboriginal Justice Strategy** and **Aboriginal Courtwork Program**; other programs with broader scope also provide support (e.g., Legal Aid, Youth Justice Services Funding Program, etc.)

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OPTIONS – Communities

B. Proposed new initiatives :

These initiatives would also support your efforts and those of other Ministers, as set out in Mandate Letters, to improve conditions for Indigenous people (Annex).

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KEY CONSIDERATIONS

- Reconciliation between the Government of Canada and Indigenous people is essential and requires:
 - Fulfilling mandate letter commitments (yours and advising other Ministers), including:

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KEY CONSIDERATIONS *(Continued)*

- Options can be delivered in the short-term [REDACTED] and over the longer-term
- Without a concerted change in approach, Canada can expect:

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PROPOSED NEXT STEPS

Justice Canada could:

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ANNEX

13

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Annex: Justice Canada's support for other government priorities

- *In addition to supporting you, the INA Minister and Status of Women Minister in fulfilling mandate letter instructions related to Indigenous people, Justice Canada is providing legal advice and legislative support, as needed, on mandate letter priorities for other Ministers in the following areas (among others), all of which contribute to resetting the relationship between Indigenous people and the Government of Canada:*
- Public Safety: developing an action plan with provinces and territories, Indigenous Peoples, and municipalities on weather-related **emergencies and natural disasters**
- Infrastructure and Communities (with INA and SOW Ministers): **improving physical infrastructure and housing** in Indigenous communities; growing and maintaining Canada's network of shelters and transition houses
- Employment, Workforce Development and Labour: renewing and improving the Aboriginal Skills and Employment Training Strategy, promoting economic development and creating jobs for Indigenous people
- Resource development: amend environmental assessment legislation to enhance the consultation, engagement and participatory capacity of Indigenous groups

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FOR INFORMATION

2015-013609

MEMORANDUM FOR THE MINISTER

Indigenous Justice: Justice Canada Policy Approaches and Future Directions

ISSUE

To provide an overview of Justice Canada's approach to helping you fulfill your mandate letter priorities pertaining to Indigenous issues. This includes working with federal partners towards resetting the relationship with Indigenous people and working with Indigenous people to build safer, socially and economically stronger Indigenous communities.

BACKGROUND

In recent months, Justice Canada has reviewed its approach to Indigenous justice issues by developing an Indigenous Justice Plan (Annex 1) to situate itself within a whole-of-government approach and to articulate innovative ways to address Indigenous justice issues across the country. The Plan leverages Justice Canada's dual roles of Attorney General of Canada and Minister of Justice to strengthen the linkages between policy, programs, laws and strategic policy choices related to litigation with the objective of resetting the relationship between Indigenous people and the Government of Canada and to work with Indigenous people to build safer, socially and economically stronger Indigenous communities.

Justice Canada's policy function includes two key streams. The department supports the Minister in her role as Attorney General by providing strategic policy advice related to the management of Aboriginal law and legal issues. This includes litigation, negotiations and consultation on positions and strategies regarding issues such as claimed or established s. 35 rights. Under this stream, the department also has the policy lead (shared with Public Safety Canada) on negotiation of justice issues in the self-government context. Secondly, the department supports the Minister of Justice in the development of legislation and administration of justice policy in such areas as criminal law, family law, human rights law, public law, private international law, constitutional law and Indigenous law. This policy role touches all points on the justice continuum from prevention, to intervention, enforcement, rehabilitation and integration. Justice Canada's policy and program responses to Indigenous justice issues are focused on reducing the over-representation of Indigenous people, as victims, accused and offenders, in the criminal justice system and to preventing violence against Indigenous women and girls.

Since the administration of justice is an area of shared jurisdiction between the federal, provincial and territorial (FPT) governments, there is an extensive history of FPT collaboration in the area of Indigenous justice policy, led by FPT Deputy Ministers (DM) Responsible for Justice and Public Safety. A DM Steering Committee on Aboriginal Justice (co-chaired by Justice Canada, Public Safety Canada, Saskatchewan's Ministry of Justice and Nunavut Department of Justice) prioritizes work for the FPT Working Group on Aboriginal Justice, which is currently focussed on addressing violence against Indigenous women and girls, FPT investments in Indigenous communities and mental health.

Close



collaboration and delivery of cost-shared initiatives with PT partners will be critical to advance Justice Canada's Indigenous policy agenda.

Current Justice Canada Policy Approach

In support of the Minister as Attorney General, the department provides **policy direction and advice** to Indigenous and Northern Affairs Canada negotiators with respect to negotiating justice issues in self-government agreements and treaties. Administration of justice refers to the scope of Aboriginal governments' jurisdiction or authority to administer, or give effect, to the laws they enact pursuant to the agreements. These provisions are aimed at supporting community-based justice approaches while also creating a foundation for more effective working relationships with provincial/territorial and federal enforcement agencies, prosecutors and courts.

In support of the Minister of Justice, several inter-related policy areas touch on indigenous justice issues and policy work is **coordinated** within the department by a small team which provides senior officials with integrated, strategic advice. This role also includes, among other things, co-leading the coordination of Indigenous justice FPT work and coordinating the department's response to the Truth and Reconciliation Commission's Calls to Action.

The department also provides legal policy advice to address **violence against Indigenous women and girls**. This includes advising on an engagement strategy and an inquiry into missing and murdered Indigenous women, and developing projects, such as a *Compendium of Promising Practices to Reduce Violence and Increase Safety of Aboriginal Women in Canada* and developing family violence awareness materials as part of the Justice Canada series *Abuse is Wrong*. Other work includes representing the department on the FPT Working Group on Aboriginal Justice's Subcommittee on Violence Against Aboriginal Women and Girls and implementing the justice components of the *Action Plan to Address Family Violence and Violent Crimes Against Aboriginal Women and Girls*.

The department also develops **criminal law policy** responses with respect to adult and youth offenders. This includes providing legal policy advice on Indigenous justice with respect to sentencing (including *Gladue*), mandatory minimum penalties (adult), administration of justice offences, restorative justice, and mental health (including Fetal Alcohol Spectrum Disorder). With regard to youth specifically, the department provides legal policy advice on the *Youth Criminal Justice Act* and undertakes various initiatives to encourage more effective responses to offending by Indigenous youth. There is also a great deal of collaboration on criminal law policy through FPT Coordinating Committee of Senior Officials working groups.

The Federal Victims Strategy (FVS) supports the development and delivery of **culturally responsive victim services** for Indigenous victims of crime, in collaboration with FPT partners and community organizations across Canada, through programming (Victims Fund) and policy initiatives (Policy Centre for Victim Issues). In addition, through the 2015-20 *Action Plan to Address Family Violence and Violent Crimes Against Aboriginal Women*, the FVS is collaborating with key stakeholders to deliver **direct services and assistance for families of missing or murdered Indigenous women** as well as training and capacity building for those working in this area.

As a key policy lever, several of Justice Canada's **programs** are either exclusively or partially targeted towards addressing over-representation. The Aboriginal Justice Strategy (AJS) and the Aboriginal Courtwork (ACW) Program are the department's two national Indigenous justice programs and are delivered in collaboration with PTs, Indigenous communities and service delivery agencies. The AJS' Indigenous community-based justice programs offer alternatives to mainstream justice processes. The ACW Program supports the delivery of court services to Indigenous people and has a two-fold purpose:



(1) to support Indigenous people who come into contact with the criminal justice system whether as accused, victims, witnesses or family members (2); as friends of the Court, to assist with communication between Courts and Indigenous people by providing accurate information about individuals before the Court, their circumstances, history and community-based resources for sentencing and bail purposes. These programs have contributed directly to achieving reductions in recidivism and post-sentencing offences, such as the violation of sentence or parole conditions.

Other Justice programs have a broader scope and provide justice system-related support to Indigenous people and communities, and some are carried out with PTs: Legal Aid, the Youth Justice Services Funding Program, the Youth Justice Fund, the Intensive Rehabilitative Custody and Supervision Program and the Justice Partnership and Innovation Program.

Building on this work, the department is exploring new, innovative approaches to addressing over-representation. The **Indigenous Policy and Program Innovation (IPPI) Hub** is exploring how innovative policy techniques and co-creation with Indigenous people can help contribute to eliminating over-representation in the criminal justice system. Innovative methods are being tested, such as design thinking, which emphasizes including the experience of those working in, and in contact with, the criminal justice system.

CONSIDERATIONS

The department's direction on Indigenous justice policy will be guided by recently developed policy options and analysis and current research that together provide a framework for future action.

It also includes helping you, as Minister of Justice, to fulfill mandate letter priorities such as: the engagement strategy and inquiry into murdered and missing Indigenous women and girls; reviewing the changes in our criminal justice system to reduce the rate of incarceration of Indigenous people; and addressing gaps in services to Indigenous people throughout the criminal justice system. Extensive collaboration with other government departments, PTs and justice stakeholders will be critical and additional investments may be required.

The department also has a key role to play by building on current initiatives with proven impact and partnering with Indigenous people and communities to support the design or adaptation of programs and services that respond directly to their needs. In this spirit, it is recommended that the Government of Canada strengthen its partnerships

Expanding On Existing Approaches

In addition to engaging with stakeholders, there are several program responses that Justice Canada could pursue

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Existing cost-shared programs such as the Legal Aid Program and the Youth Justice Service Funding Program serve significant, and in some jurisdictions, majority, Indigenous populations, and include components that specifically address Indigenous people's needs.

While there has been significant progress in the design and delivery of culturally responsive victim services, coverage in Canada has been limited and services are not available in all communities. Justice Canada could consider additional investments in the Victims Fund to support increased efforts in this area.

Exploring New Initiatives

Several new initiatives could be explored in cooperation with Indigenous people:

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CONCLUSION

In an effort to improve Justice Canada responses to Indigenous justice policy issues, it is recommended that the department expand on existing initiatives with proven impact and explore new, innovative approaches in consultation and partnership with other government departments, PTs and Indigenous stakeholders. While Justice Canada's role is key, we hold only one piece of a broader, government-wide strategy required to reset the relationship between Indigenous people and the Government of Canada based on a renewed sense of collaboration.

ANNEXES [1]

Annex 1: Relationship Reset: Justice Canada's Aboriginal Justice Plan

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**TITRE/TITLE: Vulnerable Populations Over-represented in the Criminal Justice System:
People with Mental Health Issues and Indigenous people**

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- This note provides background information, key considerations, and recommendations on how to effectively address the over-representation of vulnerable populations in the criminal justice system (people with mental health issues, including fetal alcohol spectrum disorder, and Indigenous people).
- In the past 20 years, there has been a significant increase in federal offenders reporting symptoms of serious mental illness. People with mental illness come into contact with the criminal justice system due to many factors, including inadequate mental health services, lack of affordable housing, and lack of social services and support.
- Indigenous adults and youth are severely over-represented in the criminal justice system as victims and offenders. There are many interconnected factors that could explain Indigenous over-representation including historical experiences, cultural differences, bias in the criminal justice system, and socio-economic conditions.
- Progress in the areas of mental health and Indigenous justice can only be achieved through a collaborative, coordinated approach with strong leadership to steer towards more favourable outcomes for Canada's vulnerable populations. While the expectation for progress is similar among stakeholder groups (e.g., FPT governments, Truth and Reconciliation Commission (TRC), National Aboriginal Organizations, etc.), views on how to proceed vary in scope and substance. Possible Justice Canada responses are outlined [redacted] and are designed to reduce the overpopulation of vulnerable populations in a holistic, collaborative, and sustainable way.
- The TRC's Final Report (including recommendations related to addressing the over-representation of Indigenous adult and youth offenders and victims in the criminal justice system) is expected to be released on December 15.

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MEMORANDUM FOR THE MINISTER

Vulnerable Populations Over-represented in the Criminal Justice System: People with Mental Health Issues and Indigenous people

ISSUE

How to effectively address the over-representation of vulnerable populations in the criminal justice system, including Indigenous people and people with mental health issues such as fetal alcohol spectrum disorder (FASD).

BACKGROUND

Indigenous people and people with mental health issues and FASD are over-represented in the criminal justice system as victims and offenders:

Mental Illness/FASD: Between 1997 and 2010, symptoms of serious mental illness reported by federal offenders at admission increased by 61% for males and 71% for females. Correctional Service Canada (CSC) indicates that 13% of male offenders and 29% of women offenders in federal custody self-identified at intake as having mental health problems. Data is lacking regarding mental illness in provincial facilities, but anecdotal evidence suggests the numbers are significant, especially as there are more individuals in provincial corrections than federal corrections. FASD is an umbrella term used to describe the permanent brain damage caused by prenatal exposure to alcohol. The exact prevalence of FASD in Canada and in the criminal justice system is unknown. There is very limited data on FASD prevalence, but some small studies suggest that prevalence of FASD in a correctional setting may range from 10% to 23% of youth and adults.

People with mental illness come into contact with the criminal justice system due to a myriad of factors, including inadequate mental health services, lack of affordable housing, and the insufficient and inappropriate social services and support. Moreover, individuals with mental illness are more likely to be arrested, detained, and incarcerated. Further, there is a high rate of substance abuse among individuals with mental illness resulting in a number of people with complex needs. Individuals with FASD come into contact with the criminal justice system for many of the same reasons, but also because the nature of their particular disability may render them more susceptible to negative influences, make them more impulsive and prevent them from learning from their mistakes. These individuals also commit a high number of administration of justice offences (e.g., breach of bail conditions) often due to their illness/disorder.



Indigenous people: Indigenous adults and youth are severely over-represented in the criminal justice system as victims and offenders. In 2013-14, Indigenous people made up 3% of the national population and accounted for 20% of federal inmates and 24% of provincial/territorial admissions. Indigenous youth represented 7% of the population and accounted for 41% of admissions. As victims, Indigenous people are three times more likely than non- Indigenous people to be victims of crime, and twice as likely to be victims of violent crimes. Indigenous women and girls represent a particularly vulnerable group; they are three times more likely than non-Indigenous women to experience violence and such violence results in more serious harm.

The causes of Indigenous over-representation as offenders and as victims pertain to such factors as: (1) the impact of the legacy of colonization and related government policies, including Indigenous community dislocation, land loss, family and community fragmentation, residential schools and similar policies; (2) cultural differences between Indigenous and non-Indigenous peoples, particularly in the area of criminal justice; (3) bias in the mainstream policing, justice and corrections systems; and, (4) socio-economic conditions in many Indigenous communities that include low education levels, poverty, unemployment, a large number of single-parent families, residential overcrowding, lack of mobility, and alcohol and drug abuse. These factors are aggravated by a population bulge for 15-24 year old Indigenous people that is predicted to last for at least another 20 years, and this age cohort has the highest statistical incidence of criminal behaviour in Canada regardless of sex, ethnicity or region.

CONSIDERATIONS

Stakeholder Perspectives

Mental Health and FASD

Significant pressure to amend the *Criminal Code* to consider circumstances of people with mental health issues have come from: national criminal justice groups such as the Canadian Bar Association (CBA); Parliamentarians through Private Members' Bills; and, most recently, from the Truth and Reconciliation Commission of Canada's (TRC) Summary of the Final Report (the latter relates specifically to FASD). Much of the focus has been on developing exemptions from particular sentencing provisions, i.e., mandatory minimum penalties (MMPs). As for FASD, there have also been calls to make FASD a mitigating factor for the purposes of sentencing and create a new power in the *Criminal Code* which would permit a judge to order a FASD-specific assessment. There have also been calls to increase community resources.

Many mental health advocates have indicated that the recently enacted, *Not Criminally Responsible Reform Act* could have a negative impact on mentally ill people who come into contact with the justice system. The *Act* created a high-risk not-criminally-responsible (NCR) accused designation in the mental disorder regime of the *Criminal Code*. Many argue that the creation of this new designation (which prevents NCR accused who are designated as high-risk from any access to the community except in very narrow circumstances) will deter mentally ill accused persons from raising the defence of mental disorder as they will not want to risk attracting this designation. They may be more likely to take their chances in the "regular" criminal justice stream and in the correctional system. Advocates argue that this may result in more mentally ill individuals ending up the criminal justice system (instead of the Review

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Board/mental health system) and subsequently in the community as they cycle through the system without adequate mental health treatment.

Indigenous Justice

The TRC's Summary of the Final Report and calls to action, which includes, among others, several recommendations related to addressing the over-representation of Indigenous adult and youth offenders and victims in the criminal justice system, and continuing calls for a national inquiry on missing and murdered Indigenous women and girls, have increased pressure on the federal government to respond. While a significant amount of work is already underway to address these issues, Justice Canada could also take additional measures to respond to the justice-related TRC recommendations and support the federal government in holding an inquiry into missing and murdered Indigenous women, both of which aim to address many of the interconnected issues which lead Indigenous people to become vulnerable.

Potential Justice Canada Actions on Mental Health and FASD, and Indigenous Justice

Many of the actions necessary to reduce interaction between vulnerable populations and the criminal justice system fall outside of Justice Canada's mandate, which is why it is critical to develop stronger partnerships among federal departments, Provincial and Territorial governments and Indigenous communities. Furthermore, the Minister of Justice exercises a stewardship role in upholding the values of a fair and equitable system of justice and, therefore, has a strong interest in ensuring that the criminal justice system does not have a disproportionately negative impact on some of the most vulnerable members of society. There are several measures that Justice Canada can pursue to address the over-representation of Indigenous people and people with mental illness and FASD, in the criminal justice system.

Mental Health and FASD



Indigenous Justice

Recognizing that over-representation is, in part, a manifestation of interconnected issues facing Indigenous communities, Justice Canada could pursue, with its partners, a multi-faceted approach to Indigenous justice, reflective of its dual mandate (Minister of Justice and Attorney General of Canada), which incorporates actions to reset the relationship between Indigenous people and the Government of Canada and help Indigenous people build safer, socially and economically viable communities (Annex 1).

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Justice Canada Programs:

Strategic interventions to break inter-generational cycles of violence and abuse:

Address Administration of Justice barriers causing a disparate impact on Indigenous adult and youth offenders:

Renewed focus on specific approaches to reduce over-representation:

CONCLUSION

Addressing the over-representation of vulnerable populations, in particular Indigenous people and people with mental health issues, is complex. Action will require a collaborative, coordinated approach with strong leadership to steer towards more favourable outcomes for Canada's vulnerable populations.

ANNEXES [1]

Annex 1: Relationship Reset: Justice Canada's Aboriginal Justice Plan

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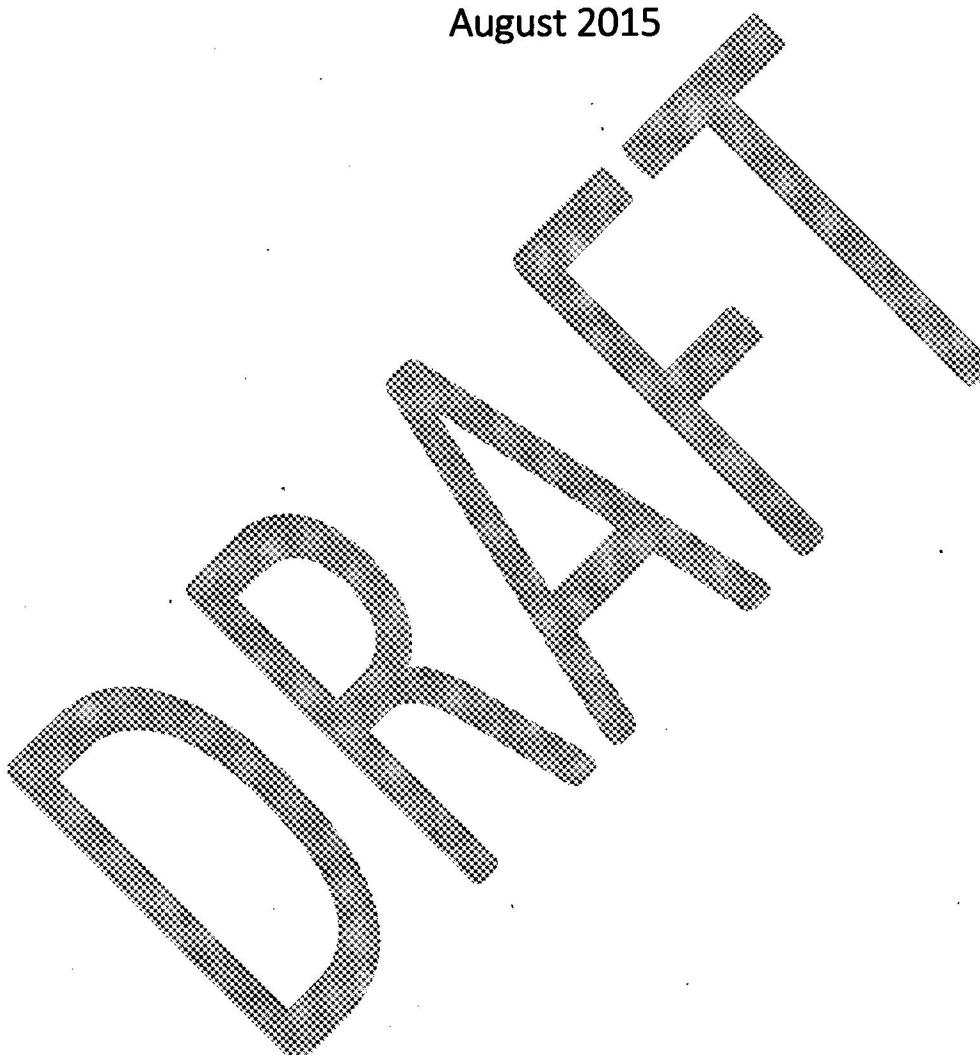
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Relationship Reset:

Justice Canada's Aboriginal Justice Plan to Help Improve the Relationship Between the Government of Canada and Aboriginal People and to Improve Conditions in Aboriginal Communities

August 2015



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Executive Summary

A stronger Canada with safer and socially and economically viable Aboriginal communities requires innovation and collective efforts to reset the relationship between the Government of Canada and Aboriginal people. The June 2015 release of the Truth and Reconciliation Commission's Summary Report and recommendations, and continuing calls for a national inquiry on missing and murdered Aboriginal women and girls, have increased pressure for greater engagement by the federal government to improve the relationship with Aboriginal people, address past wrongs and deal with their downstream effects that continue to impede many Aboriginal communities from thriving. A response to either will inevitably result in a review of all of these complex and inter-related questions.

Justice Canada has a unique vantage point to improve this relationship. In its Attorney General role in litigation and of providing legal advice, it is integrally linked to key partners in this area, while in its Minister of Justice role, policy and programs aim to help Aboriginal people access justice and have safer communities. The Department has taken the initiative to develop a common front, through this Aboriginal Justice Plan, to participate in an innovative all-of-government effort to improve the relationship with Aboriginal people to build a fairer society.

The goal of this Aboriginal Justice Plan is twofold. First, to allow Justice Canada to be in a better position to promote strategic policy choices that effectively address underlying issues in the Crown-Aboriginal relationship and/or strategically managing litigation. Second, to enable Justice Canada to take a leadership role on Aboriginal issues and ensure that a holistic, coordinated approach is taken by the Government of Canada to enable strong Aboriginal communities.

Without new initiatives, Canada can expect the continued marginalization of Aboriginal people, worsening socio-economic conditions and resulting downstream effects, increasing social unrest, continued scrutiny by international bodies, missed opportunities for economic prosperity and court decisions dictating or limiting policy approaches as the main forum for resolving disputes. The need is great for a cohesive federal Aboriginal justice approach to improve relations with Aboriginal people and to help them improve conditions in their communities.

At Justice Canada, we are linking our levers pertaining to legal advice, litigation, law reform, policy and programs to help the federal government do its part in an integrated approach. And, we continue our leadership in working with provincial and territorial partners on Aboriginal justice initiatives, including to better coordinate federal/provincial/territorial (FPT) investments, to follow up on the recommendations of the Truth and Reconciliation Commission and to address violence against Aboriginal women and girls. Achieving results requires more than just

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FPT government efforts; Aboriginal communities, private sector and non-governmental sectors are also key in the Aboriginal Justice Plan. As well, consultation with Aboriginal communities on the overall Aboriginal Justice Plan is critical to its success. Furthermore, a culture shift throughout the Government of Canada is needed, from risk aversion to policy decisions that allow innovation, flexibility and better outcomes for Aboriginal people. Justice Canada's legal advice, policy and program work can push for this culture shift.

The following Aboriginal Justice Plan offers several proposals for action in two priority areas: resetting the relationship between Aboriginal people and the Government of Canada and helping Aboriginal people build safer, socially and economically viable communities.

1. The Partners

Justice Canada's Aboriginal justice activities are carried out by policy and program staff, as well as counsel at headquarters, regional offices and departmental legal services units. The key federal partners are Public Safety Canada, the Public Prosecution Service of Canada, Aboriginal Affairs and Northern Development Canada, as well as social policy departments (Health Canada, Employment and Social Development Canada, Status of Women Canada and Canadian Heritage) and natural resources departments (Fisheries and Oceans, Environment Canada and Natural Resources Canada). Justice Canada also contributes to federal horizontal initiatives, such as the *Action Plan to Address Family Violence and Violent Crimes Against Aboriginal Women and Girls*, the Family Violence Initiative, the Urban Aboriginal Strategy, and leads the National Anti-Drug Strategy, which includes funding for treatment programs for Aboriginal people.

Since the administration of justice is an area of provincial jurisdiction, Justice Canada works closely with Provinces and Territories (PTs) through various working groups and committees, in criminal and family law, including the FPT Working Group on Aboriginal Justice, the Aboriginal Justice Strategy/FPT Working Group and the FPT and Tripartite Working Group on the Aboriginal Courtwork Program. As co-chairs of the FPT Working Group on Aboriginal Justice, Justice Canada, Public Safety Canada and PT partners are striving to coordinate our investments, link to other social programming and collaborate to address violence against Aboriginal women and girls. Justice Canada is also establishing an ADM-level FPT committee to consider options related to the recommendations of the Truth and Reconciliation Commission summary report, as requested by FPT Deputy Ministers Responsible for Justice and Public Safety at their June 2015 meeting.

Justice Canada supports programs and projects carried out by partners, including PTs, Aboriginal communities and not-for-profit organizations. The Aboriginal Justice Strategy supports community-based projects that may link clients to services outside the justice sector, such as health and employment-related services, which may be provided by private enterprises

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in some instances. Businesses may also be involved in restorative justice approaches if they were affected by a crime. More links could be made to the private and non-profit sectors.

2. The Priorities

2.1. Reset the relationship between Aboriginal people and the Government of Canada

2.1.1. Existing dynamic

Canada's relationship with Aboriginal people, and the rights, claims and aspirations of Canada's Aboriginal communities, are important horizontal issues that have significant implications for national and regional economies, as well as socio-economic outcomes. The Canadian economy remains significantly reliant on natural resources, and it is now clear that there is a need to enhance Aboriginal engagement and participation through the life-cycle of natural resource development projects if Canada wants to accelerate development and seize opportunities in increasingly open global markets.¹ There is also a notable and persistent gap in socio-economic outcomes between Aboriginal and non-Aboriginal communities, due in part to the legacy of colonization, including residential schools, and the limitations of the *Indian Act* in terms of unlocking the economic potential of reserve lands and facilitating strong, local governance. This gap creates significant downstream costs for governments and society, and remains a major impediment to improved Crown-Aboriginal relations.

¹ An estimated \$315B in major resource opportunities exist in or near Aboriginal communities, and there will be approximately 400,000 Aboriginal youth of age to enter the labour market in the next decade (7.2% of the working-age population). At the same time, most regions of Canada are subject to section 35 Aboriginal or treaty rights or claims, making Aboriginal participation critical to progress in this area.

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Importantly, there are also heightened pressures and expectations on the part of both Aboriginal and non-Aboriginal Canadians, particularly since the June 2, 2015 release of the Truth and Reconciliation Commission's Summary Report and recommendations. Both Aboriginal and non-Aboriginal Canadians are increasingly pressing for greater engagement by the federal government in an effort to improve the relationship with Aboriginal people, address past wrongs and deal with their downstream effects, including the heightened vulnerability to violence of Aboriginal women and girls, both within and outside their own communities.² A response to either would inevitably result in a review of all of these complex and inter-related questions.

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Since the first Supreme Court of Canada (SCC) decision in 1973 indicating that unextinguished Aboriginal rights exist in Canada,

2.1.2. Opportunity to chart a new course based on mutual respect and reconciliation

A review of Aboriginal justice direction in government presents a timely and important opportunity for a course correction. Given the persistent impacts of the socio-economic situation on the justice system and increasing signals sent by the courts,

² For example, increasing calls for an inquiry into murdered and missing Aboriginal women.

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have typically granted a fair degree of deference to
Crown policies that are clear attempts to work within the contours of the legal framework
elaborated by the SCC in a series of cases including *Haida Nation* and *Mikisew Cree*.

2.1.3. Core elements of a new direction

In an effort to chart a new course based on respect, reconciliation and dialogue,

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To encourage such an approach, Justice Canada could develop communications materials for staff at Justice Canada and other federal departments, as well as best practices for advisory lawyers and litigators, regarding the goals and principles of the Aboriginal Justice Plan and the strategic shift to resetting the relationship with Aboriginal peoples. Justice Canada staff could receive training on the history of Aboriginal people, history of Aboriginal-Crown relations and training in cultural competency.

For example, in the context of the *NTI* litigation, Justice Canada counsel developed a strategic plan to help the federal government bring itself into compliance with its obligations even while the litigation was ongoing, and continue to provide legal and strategic advice related to the need to significantly modify

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government operations in order to ensure that the Crown acts in accordance with other modern treaty obligations.⁴

2.2. Help Aboriginal people build safer, socially and economically viable Aboriginal communities

2.2.1. Existing dynamic

The justice system is dealing with persistent over-representation of Aboriginal people as victims and offenders in the criminal justice system. Much of this situation can be linked to downstream effects of Canada's fractured relationship with Aboriginal people, stemming from colonization, poor policy choices, insufficient investments and a lack of coordination by governments in helping Aboriginal communities address their needs. This situation resulted in cultural loss, causing dysfunction in families and communities, including wide-spread lateral violence and abuse.



⁴ One specific example is Justice Canada support for Employment and Social Development Canada's (ESDC) Framework for Aboriginal Modern Treaty Implementation which was developed in an effort to help ensure ESDC understands its obligations and honours them as a matter of good governance and risk avoidance.

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2.2.2. Opportunity to chart a new course based on a whole-of-government approach to federal investment

2.2.3. Core elements of a new direction on Aboriginal justice policy and programming

3. Proposed Actions

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3.1. Rights and Claims

Challenge

Gaps

There is a wide gap between what the law and Aboriginal people are calling upon the federal government to do and the government's preparedness to effectively respond to rights, claims and demands for rights recognition under section 35 of the *Constitution Act, 1982*. This gap exists with respect to the nature and scope of Aboriginal rights and title; the duty to consult and accommodate; and historic treaties. Section 35 claims in each of these areas will require ongoing management and attention, as well as a wider range of strategic policy authorities in an effort to respond to claims outside of the courts.

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of the Access to Information Act
de la Loi sur l'accès à l'information

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3.2. Administration of Justice

Challenge

Certain Aboriginal communities are interested in working with FPT governments to develop administration of justice arrangements that are more responsive to community needs and issues related to the administration, enforcement, prosecution and adjudication of both community and FPT laws and regulations. *Indian Act* by-laws and other community laws are not always enforced in First Nation communities, nor are existing administration of justice processes necessarily culturally relevant or responsive to community justice interests. Presently, Justice Canada and Public Safety Canada have policy authority¹¹ to negotiate enhanced administration of justice arrangements with self-governing First Nations; however, this authority is limited to those groups negotiating comprehensive self-government agreements or modern treaties.



3.3. Enhanced Strategic Litigation Management and Resolution

Challenge

Too Much Litigation

Interactions between the Crown and Aboriginal people have often led to significant disputes and grievances,

¹¹ Under Canada's *Inherent Right Policy*.

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Equality and Discrimination

Canada is currently facing several legal challenges alleging discrimination in socio-economic programs and policies relating to Aboriginal people. These cases challenge the basis for access to programs and benefits, allege insufficient funding, or take issue with decision-making processes. The programs and benefits at issue in these cases are mostly provided on reserve. Claimants often make use of comparisons to what is provided off reserve by the Provinces to allege discriminatory treatment by the federal government. There is also a group of cases challenging the registration provisions in the *Indian Act*, with registration often being a criterion for access to programs. In addition to claims directly challenging specific socio-economic policies or benefits, this loose cluster of cases also includes the CAP/Daniels action regarding the legislative scope of s. 91(24) of the *Constitution Act, 1867*. If the SCC upholds the decision of the Federal Court of Appeal that the Métis are included within the exclusive jurisdiction of the federal government, Canada will face further legal challenges for access to programs or benefits currently only provided to status Indians.

The common thread between these disparate cases is the attempt to improve socio-economic outcomes either through gaining access to programs and services, or by spurring changes to those programs and services. These cases are complex and ultimately place significant pressure on government programming, existing challenges in the fiscal relationship between FPT governments and the Crown's relationship with Aboriginal people. They are also cases where sympathies can easily fall on the side of Aboriginal groups given that Aboriginal people are among the most disadvantaged and marginalized members of Canadian society and are ultimately seeking to achieve enhanced programming and funding in areas that have implications for socio-economic outcomes.

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Aboriginal Childhood Claims

Aboriginal childhood claims involve both individual and class action cases related to alleged harm (abuse, mistreatment, loss of culture and language, “cultural genocide,” etc.) while being educated or cared for as children in day schools, foster care, adoption placements and other institutions. These claims fall outside of the Indian Residential Schools Settlement Agreement and often raise novel legal issues with potentially significant ramifications for the federal government, such as claims for loss of, or failure to protect and promote, Aboriginal culture, language and identity. In the current environment, Canada is being targeted over the Provinces due to its special relationship with Aboriginal people and, to date, the courts have been sending the strong message (in the context of class certifications) that Aboriginal people who were harmed should have access to the courts. In addition, the recent recommendations of the Truth and Reconciliation Commission based on the theme of reconciliation, provincial apologies, and the statement by SCC Chief Justice Beverly McLachlin that Canada’s “policy of assimilation” carried out by Indian Residential Schools amounted to “cultural genocide,” have heightened pressures with respect to children’s claims.



3.4. Helping Aboriginal People Build Safer, Socially and Economically Viable Aboriginal Communities

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Challenge

Aboriginal adults and youth are over-represented as victims and offenders in the criminal justice system, compared to other Canadians. In addition to concern for Aboriginal people, over-representation of Aboriginal people in the criminal justice system is a critical social issue in Canada with significant economic implications for the administration of justice across jurisdictions, and for Canadian productivity more generally, particularly given Canada's young and growing Aboriginal population.

As for offenders, despite representing only approximately 3% of the national population, Aboriginal people made up about 20% of federal inmates in 2013-14. Provincial/territorial rates varied across the country, but Aboriginal inmates accounted for nearly one-quarter (24%) of admissions. Aboriginal females accounted for a higher proportion of female admissions to provincial/territorial sentenced custody (36%) than did Aboriginal males for male admissions (25%).

With regard to youth, while there have been significant reductions in the use of the formal youth court system and custody under the *Youth Criminal Justice Act* (YCJA), the reductions have not been realized to the same extent for Aboriginal youth who are significantly over-represented in the youth justice system. In 2013-14, Aboriginal youth accounted for 41% of all admissions to youth corrections while representing 7% of the youth population. The disparity between Aboriginal and non-Aboriginal youth was more pronounced among females than males, with Aboriginal females accounting for 53% of female youth admitted to the corrections system, compared to 38% of Aboriginal males accounting for male youth admitted to the corrections system. Aboriginal youth are over-represented in both pre-trial and sentenced custody.

With regard to victims, Aboriginal people are severely over-represented in the criminal justice system as well. Overall, Aboriginal people are three times more likely than non-Aboriginal people to be victims of crime, and twice as likely to be victims of violent crime. Aboriginal women and girls represent a particularly vulnerable group; they are three times more likely than non-Aboriginal women to experience violence and such violence results in more serious harm. The 1,181 reported cases of missing and murdered Aboriginal women, as of December 2013 (RCMP report), also showed over-representation of Aboriginal women as homicide victims and as missing persons, relative to non-Aboriginal women.

The precise causes of Aboriginal over-representation as offenders and as victims centres on broad themes such as: (1) the psychological impact of the legacy of past government policies including Aboriginal community dislocation, land loss and the family and community fragmentation resulting from the effects of colonization, including residential schools and similar policies; (2) profound philosophical and cultural differences between Aboriginal and

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non-Aboriginal peoples, particularly in the area of criminal justice; (3)

(4) socio-economic conditions among Aboriginal

people that include low education levels, poverty, unemployment, a large number of single-parent families, residential overcrowding, lack of mobility, and alcohol and drug abuse, all aggravated by demographics in the form of a population bulge that is predicted to last for at least another 20 years in the age cohort (15-24) that has the highest statistical incidence of criminal behaviour in Canada regardless of sex, ethnicity or region.

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**of the Access to Information Act
de la Loi sur l'accès à l'information**

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C) Criminal Law Approaches

Aboriginal Courts and Gladue

In light of Aboriginal communities seeking to have increased discretion and autonomy in justice matters and to address underlying issues of trauma and victimization, several jurisdictions have worked with Aboriginal communities to create court models that respect Indigenous legal traditions while holding Aboriginal accused accountable. Examples include the Tsuu T'ina First Nation Peacemaker Court in Alberta and the Aboriginal Youth Court in Toronto, where preliminary findings are positive. Justice Canada is conducting a Gladue study to inform future discussions on what types of programs and services prevent re-offending and where strategic investments could be made.

Sentencing

To date, there are no authoritative studies on the effect of the 65 mandatory minimum penalties (MMPs) in the *Criminal Code* and nine MMPs in the *Controlled Drugs and Substances Act*. Nor have studies been undertaken in recent years comparing Aboriginal and non-

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Administration of Justice Offences

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The greater the number of conditions on a release order, the greater the likelihood that the accused will breach one of these conditions, which can result in an additional criminal charge or administration of justice offence (AOJO).¹⁵ This is problematic for Aboriginal or other vulnerable populations for whom it is particularly onerous to comply with conditions, therefore increasing the likelihood of receiving an AOJO. A high percentage of charges dealt with in youth court and that result in custodial sentences are AOJOS, particularly breach offences. This is a particular issue of concern for children who are in care and in the youth criminal justice system, many of whom are Aboriginal.

Alternative Measures/Diversion

The *Criminal Code* and the *YCA* have provisions for alternative and extrajudicial measures, respectively, before and after a charge has been laid. Research indicates that offending by Aboriginal youth may be less likely to be dealt with through extrajudicial measures than offending by non-Aboriginal youth.

¹⁵ AOJOS include but are not limited to failure to appear in court, breach of a probation order, being unlawfully at large, failure to comply with an order, and “other administration of justice offences” such as corruption and disobedience, misleading justice, and perjury.

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Conferencing

Both the *Criminal Code* and the *YCJA* have provisions which allow for conferences (i.e., meetings convened in the criminal justice system for a variety of reasons). In the *Criminal Code*, a conference for the purpose of diversion can occur through existing alternative measures provisions. In the *YCJA*, youth justice conferences are encouraged and can take many forms, such as family group conferences, youth justice committees, sentencing circles, or professional case conferences.

Individuals with neurocognitive disorders, including Fetal Alcohol Spectrum Disorder, may be held accountable more effectively if they are diverted from the mainstream criminal justice system and dealt with through alternative means and community supports.¹⁸ In the youth criminal justice system, many jurisdictions and communities have developed Aboriginal-specific conferencing programs to provide advice in individual cases.

Support for Aboriginal Victims

¹⁸ Consistent with Recommendation 34 from the Truth and Reconciliation Commission

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Justice Canada has led and partnered with PTs and Aboriginal communities in addressing victimization in Canada. Through the Federal Victims Strategy (Policy Center for Victims Issues and Victims Fund), Justice Canada works closely with partners to advance policy and program activities in support of culturally responsive victims' services for Aboriginal victims of crime across Canada (e.g., project funding, policy programs, stakeholder engagement, knowledge exchanges). As well, Justice Canada is a key partner in the implementation of the Government of Canada *Action Plan to Address Family Violence and Violent Crimes Against Aboriginal Women and Girls*. Additionally, Justice Canada led the development of the *Victims Bill of Rights* and the *Protection of Communities and Exploited Persons Act*, both of which may benefit Aboriginal victims of crime.

Despite significant FPT work to increase access to culturally responsive services in each province and territory, and many successes achieved, there are still significant gaps in victims services across Canada (i.e., in some communities there are no victims services, and in others there is limited access to culturally responsive victims services)

Child Advocacy Centres (CAC) across Canada are coordinating the investigation, prosecution and treatment of child abuse and provide a child friendly environment for victims and their families. Many centres are either exploring methods to deliver culturally appropriate services for Aboriginal victims and their families or have found ways to integrate culturally competent practices and policies into their services.

4. Conclusion and next steps

A relationship reset between the Government of Canada and Aboriginal people requires a change of culture and collective efforts. Heightened pressures from all Canadians, especially

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since the release of the Truth and Reconciliation Commission's Summary Report, with continued calls for a national inquiry on missing and murdered Aboriginal women and girls, and given that Aboriginal youth are the fastest growing segment of the population, are just a few of the many drivers that require the Government of Canada to act now. The Aboriginal Justice Plan is an important and essential first step to establish a way forward to attain this goal. s.23

This Aboriginal Justice Plan weaves a thread between Justice Canada's dual roles (Attorney General of Canada and Minister of Justice) to strengthen the Department's leadership within the Government of Canada on Aboriginal justice. Justice Canada is uniquely situated to draw together its federal partners in a whole-of-government approach to improve the relationship with Aboriginal people and to help Aboriginal people improve conditions in their communities. Justice Canada can leverage its FPT partnerships and links with other stakeholders to support these goals. It can also develop new partnerships for example across federal departments, with the private sector and with the non-profit sector.

A strong Justice Canada voice is needed to change the Government of Canada discourse on Aboriginal issues, including to speak from the perspective of Aboriginal interests, not just to respond to them. Justice Canada can influence a culture change whereby the law is used to inform the Government of Canada policy agenda instead of the law being used as a substitute for policy making. The law provides parameters for what is possible, but there is much room within those parameters for creativity and innovation across government. Other government departments can be advised to consider the benefits of making trade-offs, such as accepting increased legal risk to obtain better societal outcomes.

In the weeks to come, more proposals could be added to this document as discussions on Aboriginal issues continue.